

No. 11997

United States
Circuit Court of Appeals
for the Ninth Circuit

MILTON JAMES SCOTT THOMPSON,
Appellant,
vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, Co-partners, doing business as Rankin
Aeronautical Academy, JOHN GILBERT RAN-
KIN and R. S. NORSWING, Co-partners, d.b.a.
Rankin Aviation Industry; R. S. NORSWING,
Individually, and SHIRLEY LORRAINE RAN-
KIN, as Executrix of the Estate of John Gilbert
Rankin, Deceased,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

FILED
AUG 26 1948

PAUL P. O'BRIEN

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Certificate of Clerk to Transcript of Record on	13
Notice of	12
Statement of Points and Designation of Record on (CCA).....	15
Stipulation Designating Record on.....	12
Certificate of Clerk to Transcript of Record on Appeal	13
Complaint	2
Designation of Record, Statement of Points and (CCA)	15
Designation of Record, Stipulation re (DC)....	12
Judgment	10
Motion to Dismiss Complaint, Notice of.....	8
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	12
Statement of Points and Designation of Record on Appeal (CCA).....	15
Stipulation Designating Record on Appeal.....	12

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

GERALD BRIDGES,
215 West Sixth Street,
Los Angeles 14, California.

McCARTHY, DICKSON & SWINDELLS,
700 Yeon Building,
Portland 4, Oregon.

L. ORTH SISEMORE,
Stewart-Drew Building,
Klamath Falls, Oregon.

For Appellees:

O'CONNOR & O'CONNOR,
530 West Sixth Street,
Los Angeles 14, California. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for
the Southern District of California, Northern
Division.

Civil No. 708

MILTON JAMES SCOTT THOMPSON,

Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, Co-partners, doing busines under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN and R. S. NORSWING, co-
partners, doing business under the assumed
name and style of RANKIN AVIATION IN-
DUSTRY; R. S. NORSWING, individually,
and SHIRLEY LORRAINE RANKIN as ex-
ecutrix of the estate of JOHN GILBERT
RANKIN, deceased,

Defendants.

COMPLAINT

Plaintiff for cause of action against the defend-
ants and each of them, alleges:

I.

That at all times herein mentioned, the plaintiff
was and is now a bona fide resident, inhabitant and
citizen of the State of Oregon, and a non-citizen
of the State of California; that Shirley Lorraine
Rankin is the duly appointed, qualified and acting
executrix of the estate of John Gilbert Rankin, de-
ceased, by virtue of an appointment duly made by

the Superior Court of the State of California for Tulare County, and that said John Gilbert Rankin, at the time of the accident herein complained of, and each and every one of the defendants above named, were then, and at all times herein mentioned, and now are residents, inhabitants and citizens of the State of California, and that there is a diversity of citizenship existing between the plaintiff and defendants herein. [2]

II.

That more than the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest and costs is involved in this action.

III.

That at all times herein mentioned, the defendants, Rankin and Norswing, co-partners, doing business as Rankin Aviation Industry and/or Rankin Aeronautical Academy, were the owners and operators of a certain Republic Amphibian Seabee Aircraft, Department of Commerce No. NC 6096K, and that the partner John Gilbert Rankin, in furtherance of the activities of said partnership, was the pilot thereof.

V.

That on or about the 23rd day of February, 1947, at about the hour of 2:50 o'clock in the afternoon of said day, said John Gilbert Rankin, operating said Seabee Airplane, took off from the Klamath Falls Airport at Klamath Falls, Klamath County, Oregon, with the plaintiff as one of the passengers in said airplane; that said take-off executed by the said Rankin, as Pilot, and the subsequent flight was

done in a careless, negligent and reckless manner, in that, at the time and place of said take-off and flight and under the conditions of the altitude of the airport; the temperature, density and pressure of the air then existing, the defendants caused said airplane to be overloaded, and maneuvered the same in such manner as to cause said airplane to be flown into and against some high-power electric wires, or other obstructions, causing the same to crash into the ground, causing the injuries to this plaintiff as are more specifically hereinafter set out.

VI.

That the defendants were careless, reckless and negligent in the operation of said aircraft in the following particulars, to-wit:

(a) In attempting to take-off and fly said airplane when the same was overloaded; [3]

(b) In failing to keep a proper, or any, lookout for obstructions in the path of the flight of said airplane, and to so maneuver said airplane as to avoid colliding with such obstructions;

(c) In failing to keep said airplane under proper control;

(d) By failing to cause said airplane to gain sufficient forward speed to permit the climbing of same;

(e) By attempting to fly said airplane in a "nose high" attitude, and at a critical angle of attack, thereby causing the same to mush and become incapable of climbing above the objects on the terrain in the path of said flight;

(f) By taking-off said airplane and attempting to fly same at or near the stalling speed.

(g) That at all times and dates herein mentioned, there was in full force and effect, Civil Air Regulations of the Department of Commerce, Bureau of Aeronautics of the Government of the United States of America, inter alia, as follows, to-wit:

“§ 43.1010. Aircraft Operation Record. An aircraft for which an air worthiness certificate is currently in effect, shall not be operated unless there is attached to such air worthiness certificate, an appropriate aircraft operation record, prescribed and issued by the Administrator, nor shall such aircraft be operated other than in accordance with the limitations prescribed and set forth by the Administrator in such record. . . .”

That there was currently in effect for said Seabee aircraft, an air worthiness certificate and an aircraft operation record, prescribed and issued by the Administrator, which provided, inter alia, that said Seabee airplane was certificated under said Civil Air Regulations to be operated at a gross weight of not to [4] exceed 3150 pounds. That at the time and place of said take-off and accident, said aircraft was loaded and being operated by the defendants at a gross weight in excess of 3150 pounds, to-wit: more than 3489 pounds.

VII.

That the acts of carelessness, recklessness and negligence as hereinbefore alleged, and each thereof,

were the proximate cause of the accident herein complained of, and of the injuries sustained by the plaintiff as hereinafter set out.

VIII.

That plaintiff was badly battered, bruised, torn, crushed, mangled and maimed by said accident receiving, among others, the following injuries:

(a) A concussion of the brain and injury and damage thereto.

(b) A compound fracture of both of the large bones in the right forearm.

(c) Dislocation of the radio-ulner joint, with loss of motion.

(d) A fracture of one of the large bones of the left forearm at the wrist.

(e) A crushed left hand with permanent distortion, deformity and disability.

As a result thereof, it was necessary to cut away a portion of the bone and tissue of said right arm, and set said fractures, and to place both arms in casts. Plaintiff was rendered unconscious, and remained in an unconscious condition for a period of three days, and in a semi-conscious condition for a period of about one week thereafter; that it was necessary to re-set the fracture of the plaintiff's right arm, which was done about two weeks following said accident; that as a result of the injuries received as aforesaid, plaintiff developed pneumonia in both lungs, for which he underwent treatment and hospitalization, for more than a month; that plaintiff's arms and hand are permanently deformed, and that he is permanently incapacitated on

account of said accident [5] as aforesaid; that the head of the right radius of plaintiff's forearm was forcibly driven downward and lodged beneath the skin on the outer side of the elbow, causing excruciating continuing pain, and an unsightly deformity. That the injuries to plaintiff herein set out, caused him excruciating pain and suffering, and continues to cause him excruciating pain and suffering. That plaintiff still is undergoing treatment and is informed and believes and therefore states that other surgery as a result of said accident is necessary and must be performed in the future. All to plaintiff's general damage in the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars.

IX.

That prior to the accident herein complained of, the plaintiff was gainfully employed in the operation of his own profitable automotive business in the City of Klamath Falls, Oregon, and that by reason of said accident, and as a proximate result thereof, plaintiff was unable to attend his said business for a period of three months, to his special damage in the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars; that on account of said accident and injuries, plaintiff was required to, and in fact, did employ the services of a physician and surgeon, and incurred hospital, ambulance, and nurses' bills, in the total sum of approximately One Thousand Five Hundred Ninety-One Dollars and Seventy-Five Cents (\$1,491.75), all to his further special damages in the sum of One Thousand Five Hundred Ninety-One Dollars and Seventy-Five Cents (\$1,591.75).

Wherefore, plaintiff demands judgment against the defendants, and each of them, for the sum of One Hundred Fifty Thousand (\$150,000.00) Dollars general damages, and for the further sum of Nine Thousand Ninety-One Dollars and Seventy-Five Cents (\$9,091.75) as special damages, and for his costs and disbursements [6] herein incurred.

/s/ L. ORTH SISEMORE,
 /s/ CHESTER E. McCARTY,
 of McCarty, Dickson & Swindells,
 Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Feb. 18, 1948. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
 COMPLAINT

To Gerald Bridges, Esq., 216 West Sixth Street, Los Angeles, California; McCarty, Dickson & Swindells, 700 Yeon Building, Portland, Oregon; L. Orth Sisemore, Esq., Suite 213 Stewart-Drew Bldg., 731 Main Street, Klamath Falls, Oregon, Attorneys for Plaintiff.

Please Take Notice that on Monday, the 5th day of April, 1948, at 10 a.m. of said day, or as soon thereafter as counsel can be heard, at the Courtroom of the Honorable Peirson M. Hall, Judge of the above-entitled Court, in Courtroom No. 3, Federal Building, City of Los Angeles, State of California,

the above-named defendants and each [8] of them will move the Court as follows:

I.

To dismiss the complaint on the ground that the plaintiff has failed to state a claim against the defendants upon which relief may be granted.

II.

To dismiss the complaint on the ground that the defendants and each of them lack capacity to be sued.

III.

To dismiss the complaint on the ground of lack of jurisdiction over the subject matter.

This motion will be based upon this notice of motion, the complaint on file herein and the memorandum of points and authorities attached hereto.

Wherefore, the defendants and each of them pray that the complaint be hence dismissed.

Dated this 18th day of March, 1948.

O'CONNOR & O'CONNOR,
By /s/ WILLIAM V. O'CONNOR,
Attorneys for Defendants.

(Acknowledgment of Service by Mail.)

[Endorsed]: Filed March 22, 1948. [9]

In the District Court of the United States for
The Southern District of California, Northern
Division.

Civil Action No. 708-N.D.

MILTON JAMES SCOTT THOMPSON,
Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN, and R. S. NORSWING, co-
partners, doing business under the assumed name
and style of RANKIN AVIATION INDUS-
TRY; R. S. NORSWING, individually, and
SHIRLEY LORRAINE RANKIN as execu-
trix of the estate of JOHN GILBERT RAN-
KIN, deceased,

Defendants.

JUDGMENT

In this action the defendants, John Gilbert Ran-
kin and R. S. Norswing, co-partners, doing business
under the assumed name and style of Rankin Aero-
nautical Academy, and John Gilbert Rankin and
R. S. Norswing, co-partners, doing business under
the assumed name and style of Rankin Aviation In-
dustry; R. S. Norswing, individually, and Shirley
Lorraine Rankin as executrix of the estate of John
Gilbert Rankin, deceased, by their attorneys, O'Con-
nor & O'Connor, by William V. O'Connor, Esq., 530

West Sixth Street, Los Angeles, California, having appeared and filed a motion to dismiss the plaintiff's complaint herein, and the issue of law thereto arising having been duly submitted to the Court by the defendants, and having come on to be heard before this Honorable Court, and the Court, being fully advised in the premises, good [11] cause appearing therefor, did, heretofore, to wit, on the 24th day of May, 1948, order that the said motion of the defendants to dismiss the said complaint in the above-entitled case be granted;

Now, Therefore, It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendants and each of them, and that the plaintiff take nothing by this action, and that said defendants and each of them have and recover their costs herein.

Dated this 3rd day of June, 1948.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form, pursuant to Rule 7 of the Local Rules, So. Dist. of California, this 3rd day of June, 1948.

/s/ GERALD BRIDGES,
Attorney for Plaintiff.

Judgment entered June 3, 1948. Docketed June 3, 1948. Book 4, Page 356. Edmund L. Smith, Clerk.

[Endorsed]: Filed June 3, 1948. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS UNDER RULE 73(b)

Notice is hereby given that the plaintiff above named hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 3, 1948.

GERALD BRIDGES,
Of Attorneys for Appellant.

[Endorsed]: Filed June 22, 1948. [13]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

The above named parties, through their respective counsel, do hereby stipulate and designate for inclusion in the Record on Appeal the following:

I.

Complaint for Damages for Wrongful Death filed February 18, 1948, as amended by interlineation pursuant to Order of Court on May 3, 1948.

II.

Notice of Motion to Dismiss Complaint filed March 22, 1948. [14]

III.

Judgment filed June 3, 1948.

IV.

Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed June 22, 1948.

V.

This Stipulation designating contents of record on appeal.

Dated July 21, 1948.

CHESTER E. McCARTY,
L. ORTH SISEMORE,
GERALD BRIDGES,

By /s/ GERALD BRIDGES,
Attorneys for Plaintiff and
Appellant.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR,
Attorneys for Defendants and
Respondents.

[Endorsed]: Filed July 24, 1948. [15]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain full, true and correct copies of Complaint; Notice of Motion to Dismiss Complaint; Judgment; Notice of Appeal and Stipulation Designating Record on Appeal which constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$4.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26th day of July, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11997. United States Circuit Court of Appeals for the Ninth Circuit. Milton James Scott Thompson, Appellant, vs. John Gilbert Rankin and R. S. Norswing, Co-partners, doing business as Rankin Aeronautical Academy, John Gilbert Rankin and R. S. Norswing, Co-partners, d.b.a. Rankin Aviation Industry; R. S. Norswing, Individually, and Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed July 27, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11997

MILTON JAMES SCOTT THOMPSON,
Plaintiff,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY, and JOHN GIL-
BERT RANKIN and R. S. NORSWING, co-
partners, doing business under the name and
style of RANKIN AVIATION INDUSTRY;
R. S. NORSWING, individually, and SHIR-
LEY LORRAINE RANKIN as executrix of
the estate of JOHN GILBERT RANKIN, de-
ceased,

Defendants.

POINTS RELIED ON BY APPELLANT

I.

Under the laws of the State of Oregon actions for wrongful death and injuries to the person survive against the personal representatives of the wrongdoer's estate and create a substantive right of action which is not abated by the death of the wrongdoer.

II.

The law of the place of wrong determines whether a claim for damages for a tort survives the death of the tortfeasor or the injured person.

III.

If a claim for damages for injuries survives the death of the injured person or the wrongdoer, as the case may be, by the law of the place of wrong, recovery may be had upon it, by or against the representatives of the decedent.

IV.

Under the laws of the State of California actions for damages sounding in tort survive against the personal representatives of the wrongdoer's estate.

V.

A cause of action based upon tort is not such a claim under the laws of California as must be presented to and rejected by the personal representative of the deceased wrongdoer prior to instituting suit.

VI.

When a cause of action for tort exists against co-partners, the liability of the partners is joint and several and the death of the partner who committed the tortious act does not relieve the surviving partner of liability nor abate an action against him based thereon.

DESIGNATION OF RECORD

Appellant designates the entire record as certified to by the Clerk of the District Court.

L. ORTH SISEMORE,
GERALD BRIDGES and
McCARTY, DICKSON &
SWINDELLS,

By /s/ L. ORTH SISEMORE,
Attorneys for Appellants.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 3, 1948. Paul P. O'Brien,
Clerk.

